IN THE SUPREME COURT OF MISSOURI

No. 84917

FALL CREEK CONSTRUCTION COMPANY, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Judicial Review of the decision of the Administrative Hearing Commission

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant Fall Creek Construction Company is a Branson real estate development company. Appendix to Brief of Appellant at A2. (We cite that Appendix hereafter merely by page number, *e.g.*, "A2.".) Fall Creek "develops real estate in Missouri, Mississippi, Arizona, Virginia, and Arkansas." *Id*.

On October 30, 1998, Fall Creek purchased from Raytheon Travel Air Company a 1/16th undivided interest in a King Air B200 aircraft ("713TA"), for which it paid $254,000. A2. The same day, Fall Creek purchased from Raytheon a 1/8th undivided interest in a Beech Jet 400A ("798TA"), for which it paid $772,500. *Id*. On September 22, 1999, Fall Creek traded its interest in the King Air B200 for a 1/8th interest in another King Air B200 ("600TA). *Id*. Fall Creek did not make an additional payment; the value of Fall Creek's interest in the first King Air actually exceeded the value of its greater interest in the second plane. *Id*. The purchase agreements specified that the ownership interest in each instance would be delivered in Wichita, Kansas, home of Raytheon. *Id*. The purchase agreements place restrictions on Fall Creek's ability to dispose of its ownership interest in the aircraft and bar the placement of liens against the interests. A4. The Federal Aviation Administration recognizes Fall Creek and its co-owners (as opposed to Raytheon) as the legal owners of each airplane. A6. Fall Creek depreciates the airplanes in its accounting ledgers. A6.

Along with purchasing ownership interests in the airplanes, Fall Creek entered into a management agreement and a master interchange agreement with Raytheon, as have other co-owners of the Fall Creek aircraft. A3; *see also* A6. Under those agreements, Raytheon "manages the maintenance of the airplane, the crew, and the scheduling of the airplane," ensuring that the plane – or an equivalent owned by others participating in the program – is available when and where Fall Creek specifies. *Id*.; *see also* A5. Fall Creek is "in 'operational control of the airplane" until it reaches the destination Fall Creek specifies – which can change during the trip. A2. "Raytheon uses an 'optimization program'" to determine whether, when Fall Creek schedules a flight, Raytheon will substitute another owner's plane. A4.

Neither Fall Creek nor Raytheon paid sales or use tax on the purchase of the ownership interests in the airplanes. A6.

In addition to and separate from the payment for the partial interest in the airplanes, Fall Creek paid Raytheon "a monthly management fee and a variable hourly rate" for the time Fall Creek was actually using the airplanes. A5.

Between October 30, 1998, and December 31, 1999, airplane 713TA completed 26 flights that involved arrivals in or departures from Missouri; it remained in Missouri overnight 13 times; and it was used by Fall Creek eight times in Missouri. A6. Between October 30, 1998, and December 31, 1999, airplane 798TA completed 16 flights that involved arrivals in or departures from Missouri; it remained in Missouri overnight 11 times; and it was used by Fall Creek three times in Missouri. A6. (The Administrative Hearing Commission made no findings regarding use of 600TA.)

As a result of her audit of Fall Creek, the Director assessed Fall Creek for unpaid use tax, plus interest. A7. Given a reduction due to the trade-in allowance for 600TA, the parties stipulated that the amount to be assessed, if the Director is correct, is $48,928.79, plus interest. *Id*.

Fall Creek filed a complaint with the Administrative Hearing Commission on April 13, 2001, objecting to that assessment. A1. The Commission upheld the assessment. A17.

ARGUMENT

Standard of Review

This is an appeal from a decision by the Missouri Administrative Hearing Commission. The Commission's decisions are upheld when authorized by law and supported by competent and substantial evidence upon the record as a whole, and when they are not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo. 2000. This court, in essence, adopts the Commission's factual findings. *See Concord Publ'g House v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996).

The Commission's decisions on questions of law are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993).

Fall Creek Construction Company had the burden of proof before the Commission. *See* § 621.050.2, RSMo 2000.

Introduction

Appellant Fall Creek Construction ("Fall Creek") objects to the imposition of a use tax on its purchase of fractional interests in airplanes.[1] That tax is imposed pursuant to § 144.610.1, RSMo. 2000:

> A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased . . . in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

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[1] For a discussion of the economics of fractional ownership, and the myriad related tax issues, *see* Philip E. Crowther, *Taxation of Fractional Programs: "Flying over Uncharted Waters"*, 67 J. Air L. & Com. 241 (Spring 2002). Crowther explains why, under Federal Aviation Administration rules, some would choose fractional ownership. He also discusses tax impacts of fractional versus other forms of ownership. According to Crowther, "use tax is more difficult to avoid" than are other taxes. *Id*. at 303.

Fall Creek bought partial ownership interests in "tangible personal property": airplanes. It then used those airplanes in Missouri. That is sufficient to require payment of the use tax – and to meet any constitutional objection to the payment of a use tax to Missouri.

I. Because Fall Creek purchased personal property and used it in the State of Missouri, it must pay a use tax. (Responds to a portion of Appellant's Point I and to Appellant's Point III.)

Section 144.610.1 implicitly requires three things: (1) the purchase, for a particular price, (2) of tangible personal property (3) used in Missouri.

Obviously Fall Creek made a purchase. It paid $1,026,500. A2. It later made additional payments, both monthly and hourly, for maintenance and use. A5. But the Director has not assessed, and the Commission did not suggest, that Fall Creek owed use or other taxes on those payments. Fall Creek's use tax liability was calculated based solely on the initial purchase price it paid.

For that payment, Fall Creek receive partial interests in two airplanes – a 1/16th interest in 713TA, a King Air B200 aircraft (later traded for a 1/8th interest in 600TA, another King Air B200), and a 1/8th interest in a 798TA, a Beech Jet 400A. A2. Fall Creek, like other interest owners, "is clearly considered the owner of the aircraft for FAA and commercial purposes." Crowther, *supra* n. 1, at 283. Thus Fall Creek depreciated the aircraft on its books. A6. And Fall Creek, like its co-owners, "is the one with the greatest risk of loss. If there is a decline (or increase) in the value of the aircraft, that interest owner is the one who will suffer (or profit) from that change." *Id*. at 284.

Fall Creek does not suggest that airplanes are not tangible personal property. Indeed, such a claim would be ludicrous. Airplanes are not different, under the sales and use tax law, from automobiles and other vehicles.

And though Fall Creek argues, as addressed below, about the extent to which the airplanes were used in Missouri, there is no dispute that they were intended to be and were in fact used by Fall Creek in the state. For purposes of the use tax, "use" is defined as "the exercise of any right or power over tangible personal property incident to the ownership or control of that property." § 144.605(13). Fall Creek exercised "right or power" over the tangible personal property – the airplanes – of which it owned a portion.

Fall Creek is a Missouri company, with its principal place of business in Branson. A2. Fall Creek's employees "travel to and from locations where it develops real estate." *Id*. Fall Creek purchased its interest in the airplanes to provide such travel – and it subsequently used them for that purpose, departing from or arriving in Missouri various times in the fourteen months covered by the proof before the Commission. A6.

The agreements Fall Creek entered into with Raytheon and the other owners of the airplanes permits Raytheon to substitute other airplanes when Fall Creek needs to use an airplane. *See* A5. But under the agreement, substitution is to be the exception, not the rule. "The management agreement provides that Raytheon must make reasonable efforts" to have Fall Creek's own airplanes available "before providing . . . a comparable substitute aircraft."

Id. Whether in its own aircraft or a substitute, Fall Creek – not Raytheon – controls the flight. A3. Those flights constitute "use" of the airplanes.

Fall Creek argues, in its Point IV, that Fall Creek did not itself "use" the airplanes much in Missouri, pointing to the considerable role of Raytheon in maintaining and operating the planes and to the considerable use of the planes by others. But Fall Creek points to neither statute nor precedent to support its claim that relative use matters. The statute does not demand exclusive use, nor even considerable use. It merely demands use. And the facts as found by the Commission show that the airplanes were used by Fall Creek in Missouri.

Fall Creek, then, purchased tangible personal property – the airplanes – for use in Missouri. That justifies imposition of the use tax – unless there is some exception.

Fall Creek claims three. The first, addressed by Fall Creek in its Point I and in the Director's Point II below, is the "true object" test defined by this court. The second, discussed in Fall Creek's Point IV and the Director's Point III, is that the tax never became due because the airplanes kept moving and thus were excluded from the use tax by the second sentence of § 144.610.1. And the third, discussed in Fall Creek's Point II and in the Director's Point IV, is that applying the use tax to the facts here violates constitutional limitations on Missouri's ability to tax. Each claim is hollow.

II. The "true object" test does not transform valuable personal property, subject to the use tax, into nontaxable intangible property. (Responds to a portion of Appellant's Point I.)

This court has defined a peculiar rule, the "true object" test, for a narrow category of transactions where there is a "transfer of ownership . . . for valuable consideration [fell] in the literal sense within" the sales or use tax statutes. *Sneary v. Director of Revenue*, 865 S.W. 2d 342, 345 (Mo. banc 1993). But the purchases here are quite unlike those involved in the "true object" cases. That rule should not be extended to cover the purchase of tangible personal property of considerable value merely because the purchase is accompanied by a contract – *i.e.*, intangible property – for associated services.

In each case Fall Creek cites, the court was addressing a situation in which the item purchased had both tangible and intangible aspects, and where the tangible property, absent the associated intangible property, had little value. In those instances, the court "recognized . . . that the 'true object' or 'essence of the transaction' determines whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service." *Id*. The court explained, when declining to apply the "true object" approach in *Sneary*, the circumstances under which it had been used:

> Under [the "true object"] test, this Court has recognized a class of transactions in which tangible personal property serves exclusively as the medium of transmission for an intangible product or service. The intangible component is the true object of

the sale; the tangible component is of little utility and may even be discarded after the buyer has used it to obtain access to the intangible component.

Id. at 345.

The court discussed the cases cited here by Fall Creek. It said that under the application of the "true object" approach in *James v. TRES Computer Services, Inc.*, 642 S.W. 2d 347, 349 (Mo. banc 1982), "the intangible object of the sale does not assume the taxable character of the tangible medium." 863 S.W. 2d at 345. And its application in *K & A Litho Process, Inc. v. Director of Revenue*, 653 S.W. 2d 195, 197 (Mo. banc 1983), was appropriate because "the tangible medium is inconsequential and nontaxable." 865 S.W. 2d at 345. By contrast with the transactions in *TRES Computer* and *K & A Litho*, here Fall Creek purchased personal property of considerable value. The airplanes were certainly not "of little utility," and they will not be discarded after Fall Creek's use.

Those conclusions, though inherently obvious in the purchase of something like an aircraft, are additionally compelled by particular elements of the transaction. For example, in addition to considerable sums for the airplanes themselves, Fall Creek then pays *additional* amounts for maintenance and operation, through both a monthly and an hourly payment to Raytheon, pursuant to the contract under which Raytheon maintains and flies the airplanes for Fall Creek. In that respect, Fall Creek's position is parallel to that of a full owner: if Fall Creek simply purchases an airplane, it then incurs, separately, the expenses of maintaining and operating the airplane. And here Fall Creek depreciates the airplane for tax purposes – something only an owner could do.

Unlike the purchasers in *TRES Computer* and *K & A Litho*, Fall Creek has acquired – and can sell, albeit subject to restrictions – a piece of very valuable, tangible personal property. In that respect, this case is even further from *TRES Computer* and *K & A Litho* than was *Sneary*. The transaction at issue in *Sneary* was the purchase of architectural renderings. 865 S.W. 2d at 344. Such renderings have limited value other than to the architect who purchased them – and certainly not the kind of value that even a portion of an airplane would have.

Fall Creek argues, in essence, that the "true object" test is applicable not just under the peculiar circumstances where the tangible property has little value independent of the intangible property included in the transaction, but to any instance in which the purchaser is more concerned with the benefits ultimately derived from the personal property than with the property itself. Thus, under Fall Creek's reasoning, a person purchasing an automobile could claim that the "true object" of the purchase was transportation, not the vehicle itself, particularly if the purchase included an extended warranty and the promise of a replacement vehicle while the one purchased was being serviced, thus ensuring the purchaser transportation at all times. But if all the purchaser really wanted was transportation on demand, it would make more sense to use a cab. The purchase brings other burdens (including tax burdens) and benefits to the automobile owner – just as the purchase by Fall Creek brought burdens along with benefits.

The purchasers' purpose, in both this case and the hypothetical, is more complicated and complex than Fall Creek wants to admit. And certainly more complex than the purchases in *TRES Computer* and *K & A Litho*. In *TRES Computer* the *only* purpose of the transaction was to obtain nontaxable software; the purchaser had no desire to obtain computer tape and received no benefit from it independent of the software itself. *See* 642 S.W. 2d at 349-50.[2] In *K & A Litho*, the *only* purpose of the transaction was to print color photographs; the purchaser had no desire to obtain color separated film or color keys, and received no benefit from those items independent of the images they carried. 653 S.W. 2d at 196. Fall Creek carefully avoids discussing the tax and regulatory benefits of owing part of a plane. See Crowther, *supra* n.1.

Again, if all Fall Creek wanted was transportation, it could have obtained it by chartering an airplane, or even by purchasing commercial airline tickets. We don't know why it chose fractional ownership instead. But we do know that Fall Creek obtained the burdens and benefits of ownership – such as depreciation and the risk of declining airplane values or the blessing of increasing airplane values. The court should not use this case to extend the realm of the "true object" rule beyond cases in which there is virtually no value, and no real possibility of gain or loss, in the incidental tangible property involved in the transaction to be taxed.

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[2]Ironically, the taxpayer there reported the sale of the computer tapes themselves, merely disputing the tax owed on the additional value of the software the tapes carried. 642 S.W. 2d at 348.

III. That the property purchased by Fall Creek continually moves about does not exclude it from the use tax. (Responds to Appellant's Point IV.)

As an alternative, Fall Creek directs the court's attention to the second sentence of § 144.610.1. That sentence does not address the scope of the use tax, but the point at which the use tax will apply:

> This tax does not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state *until* the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

(Emphasis added.) That sentence does not exempt any tangible personal property from taxation. It merely defers taxation, preventing purchasers from having to pay use tax on property that is still in transit, even if it is traveling in or through Missouri on its way to the ultimate user.

Fall Creek argues that the airplanes it owns in part have never "finally come to rest within" Missouri, and thus that their purchase is not taxable despite their use in Missouri. But nothing in the language or context of the sentence suggests that it is intended to exclude any tangible personal property entirely from taxation after the purchaser receives and uses it, as Fall Creek suggests.

As its only authority, Fall Creek points to a Commission decision, *Nubo, Ltd. v. Director of Revenue*, No. RS-84-1778 (Mo. Admin. Hearing Comm'n Dec. 30, 1987).

There, the Commission permitted what Fall Creek demands here: an interpretation of "finally come to rest" that would exclude from the statute any item that is in near-constant motion. This court should reject that literalistic reading of the statute in favor of a practical one.

Every item of tangible personal property must "come to rest" somewhere. And that "where" need not be a place where the item sits immobile for some defined period. Otherwise, a purchaser could avoid tax by keeping the vehicle moving. A Missourian who purchased a vehicle then quickly went "on the road" would avoid paying the tax – a scenario that may seem ludicrous, but that actually tracks the current experience of former Maine Governor Angus King. Governor King, upon leaving office early this year, purchased a recreational vehicle and began a nationwide trip, never "resting" in his home state.[3] Governor King's RV may never "rest" anywhere in the sense that most personal property will. To give the statute meaning in the context of RV's and aircraft, "rest" should be construed to mean the moment the vehicle reaches the place where the purchaser "uses" it, rather than construing it to defer taxation until the RV sits in the driveway or the aircraft is hangared.

That conclusion is consistent with the precedents the Commission cited in *Nubo*, *Management Services, Inc. v. Spradling*, 547 S.W. 2d 466 (Mo. banc 1977), *King v. L &*

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[3]*See* http://www.stateline.org/story.do?storyId=285880; http://www.wheresmolly.com/

L Marine, 647 S.W.2d 524 (Mo. banc 1983), and *Director of Revenue v. Superior Aircraft*, 734 S.W. 2d 504 (Mo. banc 1987). Each case involved aircraft. And in each, the aircraft was used not just in Missouri, but in many places. The amount of use in Missouri differed. But in none of those cases did this court suggest that "come to rest" means what Fall Creek proposes.

Certainly "rest" cannot mean "hangared." That rule would have permitted taxation in *L & L Marine*, where the aircraft was regularly hangared in Missouri, 647 S.W. 2d at 526. But it would have precluded taxation in *Superior Aircraft*, where the aircraft "was hangared and repairs, if needed, made in Dayton, Ohio." 734 S.W. 2d at 507. Again, a vehicle should be deemed to have "come to rest" in Missouri no later than the date on which it is used here by the purchaser.

There is, of course, an additional complication here, not present in any of the three aircraft decisions cited in *Nubo*: Fall Creek is one of a group of joint owners of each airplane. It controls the use of the planes only part of the time. Raytheon essentially never hangars the aircraft, and services them wherever it is economical and convenient. A4. Unless the other owners are all Missouri residents or companies, the airplanes could never "come to rest" in Missouri in the manner Fall Creek demands. But "come to rest" must be applied here in a fashion that makes sense in the circumstances. Since Fall Creek only acquired a partial share in the airplanes, they "come to rest" when they are no longer in transit to Fall Creek, but are instead used in Missouri by Fall Creek. To use words from *L & L Marine*, the airplane is subject to Missouri tax once it is "used in conducting the business of" Fall Creek. Judge Blackmar's dissent[4] elaborates, giving a description that would fit this case:

> The plane, then, was on the ground at the company's principal place of business and readily subject to its control, which was exercised out of its principal office.
>
> Clearly there was an "exercise of property rights," wholly within Missouri.

647 S.W. 2d at 529 (Blackmar, J. dissenting). That here there are other owners and a company with a management and maintenance contract does not lead to a different conclusion. The other owners used the airplanes and Raytheon managed their use in a fashion that ensured, for the economic benefit of all the owners, including Fall Creek, the aircrafts' constant movement. But that cannot mean that they never "come to rest" anywhere – a necessary conclusion under Fall Creek's analysis – and are never subject to taxation in any state with a similar law.

IV. Applying the use tax to the property acquired by Fall Creek does not violate constitutional limits on state taxation. (Responds to Appellant's Point II.)

Missouri may impose a use tax when the transaction meets four requirements: (1) the tax must have a "substantial nexus with the State"; (2) it must be "fairly apportioned";

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[4] Judge Blackmar's dissent largely presaged the change in this court's constitutional analysis between *L & L Marine* and *Superior Aircraft*. There is no suggestion that the majority disagreed with his reading of the facts.

(3) it must not "discriminate against interstate commerce"; and (4) it must be "fairly related to the services provided by the State." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), quoted in *Superior Aircraft*, 734 S.W. 2d at 507. (Because of its endorsement in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this court has referred to this four-part approach as "the *Complete Auto Transit* test." *Superior Aircraft*, 734 S.W. 2d at 507). The application of Missouri's use tax to Fall Creek's purchase and use of shares in airplanes meets the *Complete Auto Transit* test – just as did the purchase and use of the aircraft in *Superior Aircraft*.

Fall Creek expressly concedes that Missouri's use tax does not discriminate against interstate commerce. App. Br. at 42. Fall Creek objects, however, at each of the other *Complete Auto Transit* points.

Fall Creek argues that there is not a "substantial nexus" between its personal property and Missouri. But in making that argument, Fall Creek ignores the nature of its property interest. It emphasizes that only a small portion of the flights of each Fall Creek aircraft actually landed in Missouri. But Fall Creek does not own the aircraft in their entirety; other owners, apparently in other states, hold most of the ownership interests. The question here must be whether *Fall Creek's portion* of the aircraft has a substantial nexus to Missouri. And the Commission findings are sufficient to support the conclusion that it does. Fall Creek used 713TA eight times and 798TA six times in Missouri. A6. Moreover, many other times Fall Creek used other planes under the interchange program

(A7) – a program in which loan of 713TA and 798TA to other, non-owners is used to in effect partially pay for those flights.

There is nothing in the Commission's findings, and Fall Creek does not even imply that there is something elsewhere in the record, to support a conclusion that Fall Creek's shares were used in other states in a fashion that would give them a taxable nexus to any other state. Thus, Fall Creek argues, in essence, for the impermissible conclusion that no state has the requisite nexus to the purchases.

When discussing apportionment, Fall Creek again refers to its portion of "the airplane's total flights during the Audit period." App. Br. at 42. But its figures, besides being cited without record support (*see* App. Br. at 42) are irrelevant here. Use tax cannot be apportioned based on what happens after the personal property is acquired and brought into the state; it is necessarily calculated based on the facts at the time of the purchase. Here, those facts lead to an obvious conclusion: that Fall Creek acquired a specific portion of ownership of the planes, with all the accompanying rights, risks, and rewards. That Fall Creek subsequently used the planes less than its ownership permitted does not change the facts at the outset, any more than an increase in or decrease in the value of the planes could affect the amount of use tax owed.

Moreover, the real constitutional question of fair apportionment is whether Missouri is taking a share that rightly belongs to another state. And here, Fall Creek never suggests that any other state has asserted or could assert a claim to use or sales tax on Fall Creek's purchase. There is, quite simply, no legitimate apportionment question.

Fall Creek's objection at the fourth *Complete Auto Transit* point is merely that the amount charged is "exorbitant." App. Br. at 42. But again, its argument is based not on the facts at the time of the purchase and transportation, but as they developed later. Indeed, most items of personal property will never demand services from a state sufficient to justify the amount charged in sales or use taxes. But that is not the question. Fall Creek's aircraft did, in fact, use the facilities of the state. *See* A6-A7. And under the arrangements Fall Creek made at the time of purchase, they could well have used those facilities far more than they did. Again, that events did not play out that way has never been a factor in determining whether a sales or use tax met the *Complete Auto Transit* test.

Fall Creek, a Missouri company, could have chosen to charter planes, and thus avoid use tax. Instead, it chose to acquire an ownership share in an airplane and to use that airplane in Missouri. That choice brought with it both burdens and benefits. Payment of a use tax on the price of its portion of the personal property was one of the burdens – precisely the same burden that Fall Creek would have incurred, though in sales tax, had it purchased that interest in Missouri.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

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Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,042 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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James R. Layton